APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued October 17, 1973 Decided February 1, 1974

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. CHARLES E. WYZANSKI, JR., Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 73-1097
No. 73-1250
No. 73-1306 vs.

SALVATORE C. PRESTA, JR. and
MICHAEL C. ROMANELLI,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72-279, No. 72-788, No. 72-796

Thomas R. McMillen, *Judge,* Richard B. Austin, *Judge.*

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* Senior District Judge Charles Edward Wyzanski, Jr., of the District of Massachusetts, is sitting by designation.

ORDER

Salvatore Presta and Michael Romanelli seek to have their pleas of guilty in three cases vacated. In 73-1097 which was in the District Court 72 Cr. 279, appellant contends that his plea was not voluntarily made in accordance with F.R.Cr.Pro. 11 and with an understanding of the consequences of the plea. In 73-1097, 73-1250, and 73-1306 which were in the District Court 72 Cr. 279, 788, and 796, each appellant contends that the district judges in those cases abused their discretion in denying motions to vacate pleas of guilty.

The first issue for us to consider is whether in 72 Cr. 279, now 73-1097, District Judge McMillen complied with the directive in F.R.Cr.Pro. 11 that he should "not accept a plea of guilty . . . without . . . determining that the plea is made voluntarily with understanding of the nature of the charge . . ." There is no controversy on this point worth attention, except for the contention that the trial judge did not determine whether (having been charged with the offense of knowingly having possession of goods stolen from interstate commerce, in violation of 18 U.S.C. §659, and with the offense of interfering by robbery with interstate commerce in articles, in violation of 18 U.S.C. §1951) appellants knew that the goods and articles were in interstate shipment. That contention has no merit. It is not an element of either the crime of possession of goods, as defined in 18 U.S.C. §659, or of the crime of interference by robbery with articles, as defined in 18 U.S.C. §1951, that a defendant know that the goods or articles were in interstate commerce. *United States* v. *Allegretti,* 340 F.2d. 243 (7th Cir. 1964); s.c. 340 F.2d. 254 (7th Cir. 1964); *Dunson* v. *United States,* 404 F.2d 447 (9th Cir. 1968) cert. denied, 393 U.S. 1111 (1968). Interstate commerce is a fact of only jurisdictional sig-

nificance, and knowledge of it is irrelevant in charges of substantive offenses apart from charges of conspiracy.

The second issue is whether in 72 Cr. 729, now 73-1097, District Judge McMillen complied with the directive in F.R.Cr.Pro. 11 that he should "not accept a plea of guilty . . . without . . . determining that the plea is made . . . with understanding of . . . the consequences of the plea." The record shows that the trial judge advised each appellant that each could receive with respect to each charge in the indictment, the relevant maximum penalty, which the judge recited, but he failed to inform them that on Count II the statute required a consecutive, not a concurrent, sentence. Despite the indication in *Marshall* v. *United States,* 431 F.2d. 355 (7th Cir. 1970) that this was a technical and unreversible error, we, in the light of *McCarthy* v. *United States,* 394 U.S. 459 (1969), assume, for present purposes, that the error would have been significant, were it not for the fact that the prosecution subsequently dismissed Count II. We, therefore, conclude that, if otherwise meritorious, this point has become moot.

The third issue raised in all these cases by appellants is that all the pleas entered while their attorney was Mr. Maloney should be vacated because there was a conflict of interest between their joint attorney, Mr. Maloney, and themselves. The only plausibly relevant fact alleged for the contention is that two months after District Judge McMillen accepted the guilty pleas from both appellants, the brother of one of them, Enrico Presta, who was also represented by Mr. Maloney, began to cooperate with the prosecution. But we hold that that fact is not significant because of its timing. And we do not regard it as an indication that appellants were deprived of the assistance of counsel, to which they are, of course, entitled, merely because they jointly shared the same counsel. *United States* v. *Foster,* 469 F.2d. 1 (1st Cir. 1972).

Judgments affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
March 1, 1974

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. CHARLES E. WYZANSKI, JR., Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 73-1907, 1250, 1306

vs.

SALVATORE C. PRESTA, JR. and
MICHAEL C. ROMANELLI,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 72-270, 788, 796.

Thomas R. McMillen, *Judge.* Richard B. Austin, *Judge.*

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* Senior district judge Charles E. Wyzanski, Jr. of the District Court of Massachusetts is sitting by designation.

ORDER

On consideration of the petition of the appellants, Salvatore C. Presta, Jr., and Michael C. Romanelli, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of the appellants for a rehearing in the above-entitled appeal be, and the same is hereby denied.

APPENDIX B

RULE 11. Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX C

18 §924 Penalties

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

(c) Whoever—

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

Added Pub.L. 90-351, Title IV, § 902, June 19, 1968, 82 Stat. 233, and amended Pub.L. 90-618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1223; Pub.L. 91-644, Title II, § 13, Jan. 2, 1971, 84 Stat. 1889.

APPENDIX D

18 § 1951

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AERICA

vs.

SALVATORE C. PRESTA, JR.,
ENRICO L. PRESTA,
MICHAEL G. ROMANELLI, and
DONALD R. SHEEHY

No. 72 CR 279

Vio.: Title 18, United States Code,
Sections 1951, 924(c) and 659.

The March 1972 Grand Jury charges:

On or about January 24, 1972, at Chicago and elsewhere, in the Northern District of Illinois, Eastern Division,

Salvatore C. Presta, Jr.,
Enrico L. Presta,
Michael G. Romanelli,
and
Donald R. Sheehy,

defendants herein, did knowingly, wilfully and unlawfully obstruct, delay and affect commerce as that term is defined in Title 18, United States Code, Section 1951(b)(3) and the movement of certain articles and commodities by robbery as that term is defined in Title 18, United States

Code, Section 1951(b)(1), in that the defendants did take and obtain certain goods and chattels, to wit:

> Approximately 9,800 pounds of fresh fish from a certain vehicle, to wit: a trailer which was located near the intersection of North Racine and West Kinzie, Chicago, Illinois, and which vehicle was under the care, custody and control of Northeast Farms, Inc.,

and at which time said goods and chattels were moving as, were a part of, and did constitute an interstate shipment of freight from M. F. Foley Co., Fresh Water Fish Co., and Abramo Fish Co., Boston, Massachusetts, to Conrad Hilton Hotel, Isaacson and Stein, Pick Fisheries, Superior Fish Distributor, Union Fisheries, Al Jessen Boston Fish Mkt., Del Farm Foods Co., Chicago Fish House, Nick DiClolla, Dominic's Fine Foods, Drake Hotel, Ireland's Oyster House, Wrigley Building Restaurant, and Blackhawk Restaurant, Chicago, Illinois, by means of actual and threatened force, violence and fear of injury, immediate and future, to the person and property of the driver hauling the trailer described above, for Northeast Farms, Inc., and in particular by use of a dangerous weapon, to wit: a gun;

In violation of Title 18, United States Code, Section 1951.

COUNT TWO

The March 1972 Grand Jury further charges:

On or about January 24, 1972, at Chicago and elsewhere, in the Northern District of Illinois, Eastern Division,

Salvatore C. Presta, Jr.,
Enrico L. Presta,
Michael G. Romanelli,
and
Donald R. Sheehy,

defendants herein, did knowingly and wilfully use and cause to be used a firearm, to wit: a handgun, in the commission of a felony, to wit: a violation of Title 18, United States Code, Section 1951, as more fully set forth in Count One of this indictment, the allegations of which count are hereby realleged and incorporated by reference as though fully set forth herein, which felony may be prosecuted in a court of the United States, to wit: the United States District Court for the Northern District of Illinois, Eastern Division;

In violation of Title 18, United States Code, Section 924(c).

COUNT THREE

The March 1972 Grand Jury further charges that:

On or about January 24, 1972, at Chicago and elsewhere, in the Northern District of Illinois, Eastern Division,

Salvatore C. Presta, Jr.,
Enrico L. Presta,
Michael G. Romanelli,
and
Donald R. Sheehy,

defendants herein, did unlawfully, wilfully and knowingly have in their possession certain goods and chattels of a value in excess of $100.00, to wit:

Approximately 9,800 pounds of fresh fish, which said goods and chattels had been embezzled, stolen and unlawfully taken and carried away from a certain vehicle, to wit:

A trailer which was located near the intersection of North Racine and West Kinzie, Chicago, Illinois, and

which vehicle was under the care, custody and control of Northeast Farms, Inc.,

and at which time said goods and chattels were moving as, were a part of, and did constitute an interstate shipment of freight from M. F. Foley Co., Fresh Water Fish Co., and Abramo Fish Co., Boston, Massachusetts, to Conrad Hilton Hotel, Isaacson and Stein, Pick Fisheries, Superior Fish Distributor, Union Fisheries, Al Jessen Boston Fish Mkt., Del Farm Foods Co., Chicago Fish House, Nick DiClolla, Dominic's Fine Foods, Drake Hotel, Ireland's Oyster House, Wrigley Building Restaurant, and Blackhawk Restaurant, Chicago, Illinois, and at the time said defendants had said goods and chattels in their possession, they then and there knew them to have been embezzled, stolen and unlawfully taken and carried away;

In violation of Title 18, United States Code, Section 659.

A True Bill
(signature illegible)
Foreman

(signature illegible)
United States Attorney

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

vs.

SALVATORE C. PRESTA, JR.,
and MICHAEL G. ROMANELLI,

Defendants.

72 CR 279

MOTION TO VACATE PLEA OF GUILTY

Now comes the Defendants, Salvatore C. Presta, Jr., and Michael G. Romanelli, by their attorney, Allan A. Ackerman, and moves this Honorable Court to enter an order vacating the plea of guilty entered by each defendant on or about May 30, 1972 and in support thereof state as follows:

1. The defendants S. Presta, Jr., and Michael Romanelli as well as defendants Enrico Presta and Donald Sheehy were indicted in March of 1972. All the defendants retained attorney Thomas Maloney, of Chicago, Illinois.

2. The defendants S. Presta, Jr., E. Presta and M. Romanelli entered pleas of guilty to the said indictment.

3. The defendants S. Presta, Jr., and M. Romanelli have now learned that there existed, or does exist a conflict of interest amongst the several defendants and their retained counsel, T. Maloney.

4. The defendant S. Presta, Jr., has learned that his brother, E. Presta, has, or will be both a government informer and a witness for the government in yet an unresolved indictment now pending in the Federal District Court before the Honorable Judge Richard Austin.

5. The defendants S. Presta, Jr., and M. Romanelli are co-indictees, along with E. Presta both in the instant indictment and in the indictment before the Honorable Judge Richard Austin. These defendants are represented by the same counsel and it patently appears that there now exists a conflict of interest which these defendants, and each of them, were not aware of until on or about July 24, 1972. (See attached Affidavit of S. Presta, Jr.)

6. The pleas of guilty are, yet further, invalid in that the court failed to conform to Rule 11 of the Federal Rules of Criminal Procedure as follows:

a) That the defendant Romanelli when questioned by the court with regard to whether the court had rendered a correct statement of facts, answered on page 11 of the transcript: (See Attached)

> Defendant Romanelli: To tell you the truth, your Honor, I really didn't know the trailer was out of state.
>
> The Court: Well, did you know that it was an interstate shipment from someplace from outside of Illinois going to—
>
> Defendant Romanelli: Honestly, no, sir.

Therefore, the defendant Romanelli falls specifically within the purview of Rule 11 as exemplified by the Court's opinion in *McCarthy* v. *United States*, 394 U.S. 467:

> Thus, in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea.

The defendant Presta remained mute during this colloquy, so whether or not he understood the nature of the charge remains an assumption since the record is bare. Further the transcript does not indicate, as it must so do, that the court inquired into the defendant's understanding of the nature of Count II and Count III; further page 12 of the transcript reveals the following colloquy between the court and the defendants E. Presta and S. Presta, Jr.:

> The Court: Do both of the Presta's agree to that statement?
>
> Defendant Enrico Presta: Yes, sir.
>
> Defendant Salvatore Presta: Yes.

At no time did the court inquire of any of the defendants as to whether or not they understood the nature of the charges but they answer only in the affirmative when the court asked whether both of the Prestas agree with the court's statement of the facts.

In support of the defendant's motion to withdraw the plea of guilty defendants Michael Romanelli and S. Presta, Jr., respectfully direct the court's attention to *Santobello* v. *New York*, 404 U.S. 257, 92 S.Ct. 495, wherein Justice Stewart writing in a concurring opinion:

> If a defendant moves to withdraw a guilty plea before judgment and if he states a reason for doing so,

> I think that he need not shoulder a further burden of proving the "merit" of his reason at that time. Before judgment, the courts should show solicitude for a defendant who wishes to undo a waiver of all the constitutional rights that surround the right to trial —perhaps the most devastating waiver possible under our Constitution. Any requirement that a defendant prove the "merit" of his reason for undoing this waiver would confuse the obvious difference between the withdrawal of a guilty plea before the government has relied on the plea to its disadvantage, and a later challenge to such a plea, on appeal or collaterally, when the judgment is final and the government clearly has relied on the plea.

b) It reasonably appears that neither the trial judge, nor the Assistant United States Attorney, made any "in depth" inquiries into whether either of the defendants knew or understood the nature of the charges; c.f. *United States* v. *Sanders,* 435 F.2d 1282. The transcript, in fact, remains otherwise.

c) The defendants, S. Presta, Jr., and M. Romanelli have, as yet, not been sentenced. The Supreme Court, in connection with other guilty plea cases stated as follows:

> "A defendant may waive his constitutional rights through a guilty plea but such waivers are not quickly presumed, and, in fact, are viewed with the "utmost solicitude". *Boykin* v. *Alabama,* 23 L.Ed.2d at 279, 89 S.Ct. 1709.

The instant plea of guilty by each defendant, S. Presta, Jr., and M. Romanelli, were products of both an obvious conflict of interest and lack of understanding of the admonishment by the trial judge (Tr. 5-12). In fact, each of these defendants negated their guilt (Tr. 11, 12).

Wherefore, defendants S. Presta, Jr., and M. Romanelli, and each of them, respectfully pray that this Honor-

able Court grant an evidentiary hearing regarding their voluntariness vel non of their plea of guilty based upon:

a) The court's lack of conformity to Rule 11 of the Federal Rules of Criminal Procedure;

b) The lack of understanding of the nature of the charges as indicated heretofore;

c) The conflict of interest as set forth both in the instant motion, supra, and the accompanying affidavit, infra.

Respectfully submitted,

.....

Allan A. Ackerman

100 North LaSalle Street
Suite 611
Chicago, Illinois 60602
DEarborn 2-2863
DEarborn 2-2981

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

vs.

SALVATORE C. PRESTA, JR., and
MICHAEL ROMANELLI,

Defendants.

---

72 CR 279

AFFIDAVIT

Salvatore C. Presta, Jr., first being duly sworn on oath deposes and states as follows:

1. That he is a defendant in the above-entitled cause.

2. That this affiant is a defendant in a second indictment with co-indictees, Romanelli and Enrico Presta.

3. That these several defendants, as well as the defendant Donald Sheehy are all defendants in 72 CR 279 and are all represented by Attorney Thomas Maloney of Chicago, Illinois (and his associate R. Devine).

4. That this affiant learned on July 24, 1972, that his co-indictee, Enrico Presta, who is also this affiant's brother, has become an informer and a witness for the Government although he is yet represented by the same

attorney; that this affiant and his co-indictee M. Romanelli learned on or about July 24, 1972, *for the first time,* that Enrico Presta is about to become, or has been, both an informer for the Government and a witness for the Government against this affiant.

5. That this affiant, and all the co-indictees, retained Attorney T. Maloney, of Chicago, Illinois, and at no time up to and including July 24, 1972 was the affiant advised that his brother, the co-indictee, was to be, or about to become a witness for the Government against this affiant.

6. That this affiant would not have entered any plea of guilty in this cause were he aware of the fact that those communications given in confidence to his attorney, the same attorney representing his brother, would or could be used to supply evidence against this affiant.

7. This affiant, yet further states, that there exist a legal defense to the instant indictment which this defendant-affiant waived upon his plea of guilty without knowledge and absent the advise of his counsel.

8. That this affiant and the defendant, Romanelli, were arrested at the same time and place by certain Chicago Police officers, without warrant and without any probable cause to believe that they, or either of them, had committed or were about to commit any crime; yet further this defendant-affiant, respectfully states, that any identification regarding this affiant and Romanelli was both unlawful and invalid and was violative of their constitutional rights as set forth in the Fourth, Fifth and Sixth Amendments of the United States Constitution.

9. That this affiant and Romanelli, have a legal defense to the instant indictment and would not have pleaded guilty but for their mutual misunderstanding of the na-

ture and consequence of their plea and the now apparent conflict generated by the activity of their co-indictee and their counsel.

Further your affiant sayeth not.

.....

Salvatore C. Presta, Jr.
Defendant-Affiant

Subscribed and Sworn to
before me this ..... day
of July, 1972.

.....

Notary Public
100 North LaSalle Street
Suite 611
Chicago, Illinois 60602
DEarborn 2-2863
DEarborn 2-2981